OKANOGAN COUNTY PUBLIC UTILITY
DISTRICT NO. 1, WASHINGTON

IBLA 75-287 Decided November 14, 1975

Appeal from decision of the Oregon State Office, Bureau of Land Management, refunding purchase money and vacating a prior decision which dismissed a contest and authorized issuance of a supplemental patent under the Recreation and Public Purposes Act.

Affirmed.

1. Administrative Authority: Generally -- Conveyances: Reverters -- Patents of Public Lands: Generally -- Public Lands: Disposals of: Generally -- Recreation and Public Purposes Act

   The Recreation and Public Purposes Act, and the regulations thereunder, do not authorize additional payment for the issuance of a supplemental patent (which voids an earlier patent's reversionary provision) as an alternative to forfeiture for noncompliance with the Act's provision that land patented under the Act only be used for an established or definitely proposed public project within a reasonable time following issuance of patent. The Department can alienate interests in public lands only within the limits authorized by law; therefore, issuance of a supplemental patent which eliminates the Act's mandatory reversionary provision is impermissible.

2. Administrative Authority: Estoppel -- Patents of Public Lands: Generally -- Public Lands: Disposals of: Generally -- Recreation and Public Purposes Act

The Department of the Interior is not estopped from denying the legality of a payment in lieu of forfeiture provision inserted in a Recreation and Public Purposes Act patent when such denial works no serious injustice against the patentee and implementation of the provision would harm the public interest by divesting the Government of all jurisdiction over the patented land, thus, precluding enforcement of the Recreation and Public Purposes Act requirement that lands patented under the Act be devoted to a definitely proposed project for the benefit of the public.

APPEARANCES: Earl K. Nansen, Esq., of Nansen & Price, Omak, Washington, for appellant; William G. Kelly, Jr., Esq., Division of Energy and Resources, Office of the Solicitor, Department of the Interior, for the United States.

OPINION BY ADMINISTRATIVE JUDGE RITVO

The Okanogan County Public Utility District No. 1, Washington, has appealed from a decision of the Oregon State Office, Bureau of Land Management (BLM), dated December 9, 1974, declaring that appellant's additional purchase money would be refunded, and vacating a prior decision, dated March 11, 1974, which dismissed a contest proceeding filed against appellant and authorized issuance of a "supplemental patent" under the Recreation and Public Purposes Act, 43 U.S.C. § 869 (1970).

Pursuant to the Act of February 15, 1901, 31 Stat. 790, as amended, 43 U.S.C. § 959 (1970), the Department issued right-of-way power permit Spokane 017205 to appellant's predecessor on January 9, 1918, for the purpose of developing a diversion dam, reservoir, power house, electrical transmission line and appurtenant structures on the Similkameen River in Okanogan County, Washington. The permit was subsequently transferred to appellant in 1945, and was to extend until expiration on July 9, 1963. On November 6, 1950, appellant filed an application for a license with the Federal Power Commission pursuant to the Federal Power Act of 1920, 41 Stat. 1063, as amended, 16 U.S.C. § 791a et seq. (1970). 1/ On June 26, 1956, the Federal Power Commission (FPC)

1/ Section 23 of the Federal Power Act states that the Act shall not affect any permit theretofore granted, and that the permittee may apply for a license upon application to the Federal Power Commission. See also Solicitor's Opinion, 53 I.D. 442 (1931); Keating Gold Mining Co., 52 I.D. 671 (1929).

issued a license order, 15 F.P.C. 1602, to appellant for its operation, Power Project No. 2062. Shortly after the FPC issued its license order, appellant discontinued operations for power purposes because the facilities had become obsolete and continued operation was economically unfeasible. A rehearing on appellant's FPC license was granted in 1956, but the time and place for the hearing was left open. In a letter dated December 17, 1959, the FPC notified appellant that as long as the project remained inoperative and the project structures occupied lands of the United States, the project would remain under the jurisdiction of the Department of the Interior, in accordance with power permit Spokane 017205. 2/ However, should the project ever be rehabilitated for power purposes, "a license from this Commission would be required for the operation and maintenance of the project." 3/

Prior to expiration of its power permit, on March 29, 1962, appellant filed Recreation and Public Purposes Act application Washington 04473 for land in T. 40 N., R. 26 E., W. M., Washington, for the area encompassed by its power permit, in order to "control land around pool and hydroelectric facilities and to develop for public recreation purposes." The applicant further stated that it was authorized to hold the land for these purposes pursuant to "statutes of the State of Washington." The BLM informed appellant that its application was deficient as no plan of development was submitted. On August 9, 1962, appellant submitted an amendment to its application in which it proposed to develop nine picnic areas with tables, fireplaces, fencing, plus sanitation and refuse facilities. Development was to get underway within five years. The BLM determined that the amended application was satisfactory.

Following the completion of a favorable field examination report, it was recommended that the land be classified for sale on lease under the Recreation and Public Purposes Act. Appellant petitioned for a sale rather than a lease in order to protect its water rights. By decision dated July 8, 1963, the BLM authorized purchase of the land by appellant pursuant to the Recreation and Public Purposes Act. Thereafter, Patent No. 1234121 was issued to appellant on November 12, 1963, for 144 acres of land to be used "for park purposes only." The patent was subject, in part, to the following:

2/ All of the subject lands were withdrawn in Power Site Reserve No. 179, approved March 21, 1911. The lands were restored to entry on September 21, 1959, subject to the provisions of section 24 of the Federal Power Act.

3/ There is no indication in the record that the original license order was rescinded as suggested by this letter. The license was not revoked until 1974. See discussion infra.

> If the patentee or its successor in interest does not comply with the provisions of the approved plan of development, filed on August 10, 1962, with the Bureau of Land Management, or with the management stipulations as set forth in the Land Office decision dated July 8, 1963, or by any revision thereof approved by the Secretary of the Interior or his delegate, said Secretary or his delegate, after due notice, and opportunity for a hearing, may declare the terms of this grant terminated in whole or in part. The patentee, by acceptance of this patent, agrees for itself and its successors in interest that such declaration shall be conclusive as to the facts found by the Secretary or his delegate and shall, at the option of the Secretary or his delegate, operate to revest in the United States full title to the lands involved in the declaration.
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> The Secretary, or his delegate, may in lieu of said forfeiture of title require the patentee or its successor in interest to pay the United States an amount equal to the difference between the price paid for the land by the patentee prior to issuance of this patent and 50 percent of the fair market value of the patented lands, to be determined by the Secretary or his delegate as of the date of issuance of this patent, plus compound interest computed at four percent beginning on the date this patent is issued.
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> Provided, that, if the patentee or its successor attempts to transfer title to or control over the lands to another or the lands are devoted to a use other than that for which the lands were conveyed, without the consent of the Secretary of the Interior or his delegate, or prohibits or restricts, directly or indirectly, or permits its agents, employees, contractors, or subcontractors (including without limitation, lessees, sublessees and permittees), to prohibit or restrict, directly or indirectly, the use of any part of the patented lands or any of the facilities thereon by any person because of such person's race, creed, color, or national origin, title shall revert to the United States.

On July 2, 1965, appellant contacted the BLM and requested a meeting to discuss its patent. Appellant informed the BLM that its power plant was non-operational and that the FPC was going to cancel its license. Appellant stated that it had not developed the land but still wanted to retain ownership in order to protect

its water rights, and suggested that the payment in lieu of forfeiture provision in the patent could be used as a means of keeping title despite non-development. In a BLM memorandum dated February 24, 1967, it was recommended that, if the FPC canceled appellant's license, the Department declare a partial reversion of the land with the exception of some riparian land which could be sold to appellant; if the FPC did not cancel the license, a full reversion could take place as there would be no need for appellant to own the land as the license allows full use and protection of the water rights.

In a letter to appellant dated February 24, 1967, the BLM requested information on the status of appellant's FPC license, and noted that assuming the payment in lieu of forfeiture provision was applied, appellant would still have to demonstrate that the public would materially benefit and be allowed to use the land. The BLM also asked appellant to explore the possibility of transferring the land to the County for recreation development. Appellant responded stating that the proceedings before the FPC had been suspended.

In a memorandum dated March 4, 1968, the District Manager informed the State Director that there had been further meetings with appellant to discuss its continued failure to comply with the patent requirements and appellant had informed the BLM that the Washington State Attorney General ruled that appellant was not authorized to expend its funds for park purposes. 4/ The District Manager concluded that appellant was, therefore, not a qualified recipient under the Recreation and Public Purposes Act. On March 12, 1968, the State Director wrote to appellant noting its continued failure to develop the land and the State Attorney General's ruling that appellant was not authorized to engage in such activities, and added:

4/ In a letter dated October 11, 1965, from appellant to the Assistant Attorney General, Washington, appellant stated that it had acquired the grant under the Recreation and Public Purposes Act in order to protect its property rights and that it intended to make available the unoccupied portion of the land to public use but had "not intended to make additional investment." Appellant noted that if other public bodies wished to develop improvements on the land, they would be permitted to do so. Appellant urged that there was a danger to the Public Utility District in that had it not requested the grant, the subject land may have passed into alternative ownership, and should appellant then fail to maintain its FPC license, "the improvements located thereon would revert to the landowner, and water rights lost."

> If our understanding is correct the patent is voidable and we suggest that the P.U.D. voluntarily reconvey the land to the United States.
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> The land was classified under the Recreation and Public Purposes Act and if it were reconveyed could be made available to other qualified agencies such as the County or State for park purposes.
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> Currently, the land is also involved in an outstanding Federal Power Commission permit to the P.U.D. Your patent is subject to a reservation under Section 24 of the Federal Power Act. [5/] Any subsequent disposals would be subject to such a reservation. The administration of Federal power licenses is solely within the jurisdiction of the Federal Power Commission. Consequently, the status of the power license is not a controlling factor as to the question of compliance under the Recreation and Public Purposes patent.

In a memorandum dated March 13, 1968, the State Director instructed the District Manager to proceed on the basis that appellant would voluntarily reconvey the land, at which time other applications by qualified agencies could be considered. In further correspondence in March, the BLM and appellant discussed the possibility of transferring the land to the County or other government agency authorized to operate a park facility, subject to a reservation in favor of appellant for power purposes. No final agreement was reached.

By letter dated December 19, 1968, the BLM informed appellant that the 5-year time limitation for recreation development under the grant had expired and the land should, therefore, be reconveyed to the United States. Appellant, however, took no action.

5/ The following reservation is in appellant's patent:

"Reserving unto the United States, its permittee or licensee, the right to enter upon, occupy and use, any part or all of said lands for the purposes provided in the Act of June 10, 1920 (41 Stat. 1063) and subject to the conditions and limitations of Section 24 of said Act, as amended by the Act of August 26, 1935 (49 Stat. 846), and subject to the stipulation that, if and when the lands are required in whole or in part for power development purposes, any structures or improvements placed thereon which shall be found to obstruct or interfere with such development shall, without expense to the United States or its licensee, be removed or relocated insofar as may be necessary to eliminate interference with power development."

In a field examination report filed April 4, 1969, the examiner stated that no development had taken place on the land, and that public use of the land was, in fact, discouraged by appellant. The access road was marked, "Road Closed," and the dam area was marked, "Private Property, No Trespassing." The examiner recommended declaring a reversion of the lands in favor of the United States. On the same day that the field examination report was received, the District Manager informed the State Director that:

> Based upon our field examination regarding the lack of any development as required by the patent, it is our opinion that in effect, the lands have been devoted to uses other than that for which the lands were conveyed without the consent of the Secretary.
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> Therefore, pursuant to Title 43, U.S.C. (869-2) the title to the lands should revert to the United States.

The District Manager recommended initiation of a contest proceeding to cancel the patent.

On July 17, 1969, the BLM issued a complaint to appellant charging:

> 1. Contestee has not complied with the approved plan of development as required by the provisions of Patent No. 1234121 in that it has not developed or commenced development of the recreational facilities described in said plan within the time allowed.
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> 2. Contestee has not complied with the management stipulation incorporated by reference in Patent No. 1234121 in that it has not maintained the lands open to the use of the public.
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> 3. Contestee has violated the conditions and limitations of the patent and the provisions of the Act of June 14, 1926 (44 Stat. 741; 43 U.S.C. 869), as amended, by devoting or causing the lands to be devoted to a use or uses other than for park purposes, without the consent of the Secretary.

Appellant filed an answer, stating in part that it had accepted the grant in good faith and any technical violations or failure to comply with the terms thereof were due to factors beyond its control. The contestee proposed that it voluntarily transfer

its rights to a qualified public agency. In subsequent letters appellant suggested that the matter be resolved by informal negotiations rather than through a hearing process, and also requested that it be given a five-year extension within which to develop the property. 6/

By letter dated August 14, 1969, appellant requested that the BLM allow it to take advantage of the patent provision permitting payment equal to the difference between the price paid for the land and 50% of the fair market value of the land as of the date of patent plus compound interest computed at 4%. In a response dated August 21, 1969, the BLM informed appellant that:

> The provision in the patent providing for payment in lieu of forfeiture is not an option available to the patentee, but may be exercised in the discretion of the Secretary of the Interior under certain conditions. In this instance we understand that the patentee is not authorized by law to operate or to purchase land for park purposes. Consequently, payment in lieu of forfeiture would not be authorized.

By letter dated September 24, 1969, appellant asked the BLM to withdraw the contest and revise the conditions in the patent to embrace only those items which the appellant was empowered to exercise. In return, appellant offered to cooperate with other public agencies and make the land available for public development and use. As an alternative, appellant stated that it was willing to accede to the BLM request for reconveyance, but believed that this would not be in the public interest if appellant were to lose the dam and appurtenant water rights.

On October 3, 1969, the BLM received the first of many inquiries from the FPC concerning the status of appellant's Recreation and Public Purposes grant. The BLM responded informing the FPC of the contest proceeding and noting that the patent contained a reservation under section 24 of the Federal Power Act, and that Power Project No. 2062 was in no way affected by the status of the patent.

Following a request for advice, the Regional Solicitor informed the BLM in 1969 that while preservation of the dam and reservoir might be desirable, the critical question was whether appellant should be permitted to accomplish this objective by retention of the land in violation of the conditions in the patent as well as the

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6/ Appellant did not explain how during the 5-year extension period it proposed to overcome the State Attorney General's ruling that it was not authorized to spend funds for recreation purposes.

statute under which the patent was issued. The Regional Solicitor recommended that the BLM not accede to appellant's request that the contest be withdrawn and the patent revised.

Two years later, on March 10, 1971, the BLM requested further advice from the Regional Solicitor as to whether appellant was qualified under the Recreation and Public Purposes Act to receive an unqualified fee patent, pursuant to the payment in lieu of forfeiture clause, even though appellant lacked authority under State law to develop the lands for recreation purposes. By response dated May 18, 1971, the Regional Solicitor did not directly speak to the payment in lieu of forfeiture issue. Instead, he pointed out that a change in required public use which conformed to appellant's authorized powers might be permissible under the Act; otherwise, a reversion should be declared.

Thereafter, all action on the matter was suspended pending completion of a study of the area by the Bureau of Reclamation to see whether it wished to include the subject land within its proposed Oroville-Tonasket Project. On July 3, 1973, the State Director was informed by the Solicitor's Office that the Bureau of Reclamation was not in a position to assume control over the site at the present time or in the near future and, therefore, recommended that the BLM no longer delay action on the Recreation and Public Purposes patent matter.

After further discussion with the BLM, by letter dated November 16, 1973, appellant requested the following:

> The Public Utility District is unable to comply with the recreation requirements of the patent because of lack of legal authority to develop recreation sites. However, the District desires to acquire the property pursuant to the provision contained in the patent for payment of the difference between the amount previously paid and one-half of the fair market value of the land.
>
> You are requested to make a determination of the fair market value and advise the District of the consideration required to obtain title free of the recreation development conditions presently in effect.

Following completion of an appraisal report dated January 21, 1974, the BLM State Office issued a decision dated March 11, 1974, authorizing appellant to purchase the land in accordance with the payment in lieu of forfeiture provision in its patent. Upon receipt of the additional purchase money, $3,300, the contest proceeding would be dismissed and a supplemental patent would be issued to

appellant which would remove the existing forfeiture clause in the original patent. Thereafter, appellant submitted the purchase money. On April 10, 1974, the BLM filed a motion to withdraw the contest complaint, and the contest was dismissed on July 23, 1974. 7/

On April 16, 1974, a request was made by the State Director to the Director, BLM, for transmittal of a sample format for a "supplemental patent" under the Recreation and Public Purposes Act. By memorandum dated July 17, 1974, the Director informed the State Director that:

> * * * there is no authority to issue a supplemental patent to eliminate the reversionary clause. Moreover, the "in lieu of forfeiture" clause in the original patent under which the "supplemental patent" would be issued conflicts with the Recreational and Public Purposes Act, and should be treated as void. The R&PP Act allows conveyances of public lands only for "public purposes" to be carried out by an established or definitely proposed project. This clause in the patent allowing for payment of additional money in lieu of forfeiture for failure to carry out the definitely proposed public project therefore is in direct conflict with the conditions of the statute.

The Director recommended that further consideration be given to the transfer of the land to a qualified applicant who would be able to develop the lands as contemplated by the patent.

On August 2, 1974, in a memorandum to the file, the BLM recommended that if a qualified applicant expressed an interest in the land the BLM would pursue transferring the land, but in view of the Director's memorandum, the BLM would in the meantime limit its involvement in the matter to periodic compliance checks to see if the reversionary clause had been violated by appellant. Thereafter,

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7/ In the meantime, on March 27, 1974, the Commission Staff Counsel for the FPC filed a motion for an order vacating the order granting a rehearing, rescinding the order issuing a license, and dismissing appellant's application for a license. The Commission Counsel stated that based on the history of the project, "particularly with respect to the fact that the Oroville Project No. 2062 no longer generates any power," the previous order issuing a license was rescinded and appellant's application for a license was dismissed without prejudice to the future possibility of licensing if the project was rehabilitated for power generation. Public notice of the Commission Counsel's motion was published at 39 F.R. 14766 (April 26, 1974) permitting a protest of the motion.

the BLM issued its decision dated December 9, 1974, stating that the "payment in lieu of forfeiture" clause in the patent was void since it was in direct conflict with the Recreation and Public Purposes Act and, therefore, the Department was not authorized to issue a supplemental patent to eliminate the reversionary clause in the original patent. Accordingly, the decision of March 11, 1974, was vacated and the additional purchase money was to be refunded.

The arguments in appellant's statement of reasons on appeal can be broken down into two general areas, namely, (1) the issue of whether the payment in lieu of forfeiture provision is valid, and (2) assuming it is invalid, the issue of whether the Department can now avoid its application. Appellant urges that issuance of a supplemental patent pursuant to the payment in lieu of forfeiture clause would not be contrary to the Recreation and Public Purposes Act. Appellant also alleges that it purchased the original patent "in reliance upon this 'in lieu of forfeiture clause,'" and because of the provision it "consented to the dismissal" of the FPC license proceedings, thus adversely altering its position for protecting its water and future power rights. Accordingly, appellant concludes that the Department is now estopped from avoiding application of the provision in favor of appellant. Appellant requests that the Board reverse the decision below and order the issuance of a "supplemental patent" eliminating the reversionary clause in appellant's present patent. Appellant also requests a hearing on the matter.

In his answer to appellant's statement of reasons on appeal, the Solicitor states that the only issue presented is whether the BLM can be compelled to issue a supplemental patent in accordance with the payment in lieu of forfeiture clause in the existing patent. 8/ The Solicitor argues that this clause:

8/ In addition to its other arguments on appeal, appellant maintains that since the subject land passed out of the Government's hands by issuance of the 1963 patent, the Department lacks jurisdiction, short of recommending court suit, to take any action to affect appellant's title to the land. We note that the decision below did not involve a determination as to the present status of appellant's title and, thus, we do not reach this issue. For a discussion of the Department's right to declare a revestiture of title for breach of condition and to have a judicial enforcement of a forfeiture, see City of Monte Vista, Colorado, 22 IBLA 107 (1975); Clark County School District, supra; Solicitor's Opinion, 58 I.D. 658 (1944); see also Kern River Co. v. United States, 257 U.S. 147 (1921); United States v. Florida, 482 F.2d 205 (5th Cir. 1973); Feather River Ry. Co., 71 I.D. 415, 419 (1964); 39 Op. A. G. 39 (1937).

> * * * cannot be implemented without violation of the R&PP Act, because the land can be patented only if it is "to be used for an established or definitely proposed project," and appellant demands a patent free of this requirement. See Clark County School District, 18 IBLA 289, 304 (1975).

The Solicitor also points out that, in any case, the payment in lieu of forfeiture provision, by its express wording, is to be exercised at the discretion of the Secretary or his delegate, and in this instance the Secretary's delegate, the BLM, has decided not to execute the provision.

[1] As to the validity of the payment in lieu of forfeiture provision, this issue was settled by the Board in Clark County School District, 18 IBLA 289, 82 I.D. 1 (1975). The provision appears to have originated in the Bureau of Land Management Instruction Manual. 9/ See Volume 5, BLM Manual, Ch. 2.26 RECREATION AND PUBLIC PURPOSES, Illustration 11. We stated in Clark County School District, supra at 299-300, n.4:

> Regardless of the instructions in the Office Manual, the law does not provide for a sale on the terms requested by the [appellant]. The Recreation and Public Purposes Act provides that sales "shall be made at a price to be fixed by the Secretary of the Interior through appraisal or otherwise, after taking into consideration the purpose for which the lands are to be used." 43 U.S.C. § 869-1(a) (1970). 43 CFR 2741.7(c) (1973), provides that sales "will be made at prices fixed through appraisal of the fair market value or otherwise, taking into consideration the purpose for which the land will be used."

Furthermore, we hold that even assuming the land was presently appraised for sale at its full fair market value, the Recreation and Public Purposes Act does not authorize supplemental payment as a means of circumventing forfeiture for noncompliance with the patent provisions. At the time of the grant to appellant, the Act provided:

9/ As has often been stated by the Department, the BLM Manual does not have the force and effect of law, but is simply utilized internally for the instruction of Bureau personnel as an aid in the interpretation and application of relevant statutes and administrative regulations. Edward W. Kirk, 20 IBLA 156, 159 (1975); Clark County School District, supra at 306; John Paul Hinds, 18 IBLA 385, 388 (1975); Barbara Rubenstein, A-28508 (December 28, 1960).

> * * * If at any time after the lands are conveyed by the Government, the grantee or its successor attempts to transfer title to or control over these lands to another or the lands are devoted to a use other than that for which the lands were conveyed, without the consent of the Secretary, title to the lands shall revert to the United States.

43 U.S.C. § 869-2 (1958) as amended by § 2 of the Act of September 21, 1959 (73 Stat. 751). 10/

As correctly noted by the Solicitor, at the time of the grant, and at the present time, public land could be patented under the Act only if it was "to be used for an established or definitely proposed project." 43 CFR 254(b) (1963) 11/; City of Monte Vista, Colorado, 22 IBLA 107 (1975); Clark County School District, supra at 301-02. In its original patent application, appellant submitted a recreation development plan which it was legally precluded from implementing. Had the BLM been aware of this impediment, which disqualified the applicant, it would not have issued the patent. However, in the face of appellant's representation that it was authorized under State statutes to expend funds on the proposed plan, the BLM felt assured that the requirements for a "definitely proposed project" were met. Now appellant wishes to escape the consequences of this dilemma by purchasing freedom from fulfilling the requirements of the Act. The absurdity of such a proposal is readily apparent. The Act and the regulations thereunder require that lands patented under the Act be devoted to approved public projects within a reasonable time following issuance of patent. Granting a supplemental patent to appellant which removes the reversionary provision for noncompliance would result in giving appellant unrestricted title to public lands which were never put to use for the public purposes set forth in the Recreation and Public Purposes Act. As was recently held, "The Department can alienate interests in public lands only within the limits authorized by law." Union Oil Co. of California v. Morton, 512 F.2d 743, 748 (9th Cir. 1975). Accordingly, issuance of a supplemental patent which eliminates the Act's mandatory reversionary provision is impermissible.

[2] Next we come to appellant's argument that regardless of the illegality of the payment in lieu of forfeiture clause, the Government is estopped from denying its application in the present

10/ The amendment, eliminated the last sentence of section 869-2 which had provided that the reversionary provision would cease to be in effect 25 years after the issuance of patent.
11/ 43 CFR 2741.2(b), the current regulation, is to the same effect.

case. It has been held that the doctrine of equitable estoppel does not apply to the United States. Utah Power & Light Co. v. United States, 243 U.S. 389, 409 (1917); Union Oil Co. of California v. Morton, supra; 12/ United States v. Cappaert, 508 F.2d 313, 319-20 (9th Cir. 1975); United States v. Florida, 482 F.2d 205, 209 (5th Cir. 1973); 13/ Atlantic Richfield Co. v. Hickel, 432 F.2d 587, 591 (10th Cir. 1970); Udall v. Oelschlaeger, 384 F.2d 974 (1968); Beaver v. United States, 350 F.2d 4, 8-9 (9th Cir. 1965), cert. denied, 383 U.S. 937 (1966); 43 CFR § 1810.3; see also Hudson Investment Co., 17 IBLA 146, 169-72, 81 I.D. 533, 544-46 (1974). Exceptions to the general rule do exist, however, and the doctrine has been applied against the Government when its absence would threaten to work a serious injustice and the public interest would not be damaged by the imposition of estoppel. United States v. Wharton, 514 F.2d 406 (9th Cir. 1975); United States v. Lazy FC Ranch, 481 F.2d 985, 989 (9th Cir. 1973); Brandt v. Hickel, 427 F.2d 53 (9th Cir. 1970); United States v. Georgia-Pacific Co., 421 F.2d 92 (9th Cir. 1970).

The facts in the present case do not come within the exception to the general rule, and thus we hold that appellant's estoppel argument must be rejected. First of all, we note that no "serious injustice" results from the Department denying appellant's request for the supplemental patent. To begin with, appellant's allegation that it purchased the original grant in reliance upon the payment in lieu of forfeiture clause is untenable. As the Solicitor correctly points out, even assuming the validity of the clause, by its terms its execution is left to the discretion of the Department. See Clark County School District, supra at 307. Furthermore, appellant was notified by letter dated August 14, 1969, that: "The provision in the patent providing for payment in lieu of forfeiture is not an option available to the patentee, but may be exercised in the discretion of the Secretary of the Interior * * *." Having the clear language of the clause before it, and the notification from

12/ In the Union Oil case, supra at 748 n.2, the court held that the Secretary's issuance of an oil and gas lease and Union Oil's reliance on its terms did not estop the Government from enforcing statutory provisions contrary to the lease. The court added: "We are very reluctant to apply estoppel against the Government in cases involving rights to public land, * * *" citing Beaver v. United States, infra.

13/ In the Florida case, supra, the Court held that the Government was not estopped from denying the validity of an agreement which the law did not sanction; additionally the Court held that the Government could declare a revestiture of land which had not been used exclusively for public park purposes as required by a grant issued pursuant to Government surplus property act provisions.

the Department, we find that any belief held by appellant that the Department could be compelled to apply this clause was unreasonable. Accordingly, appellant suffers no detriment by the Department now declaring the invalidity of a provision which it was never required to apply in the first place. 14/

In addition, we are not persuaded by appellant's allegation that its position vis-a-vis the FPC was adversely affected by reliance on the invalid patent provision. First, we note that in a letter dated October 19, 1965, from appellant to the Office of the Solicitor, Department of the Interior (Ex. C.), appellant requested advice regarding whether the Department could issue a right-of-way permit for a non-operating power project. Appellant stated: "Because the project is not now being operated, it is doubtful that the Federal Power Commission will license the project." In his motion dated March 27, 1974, the FPC Commission Staff Counsel reviewed the BLM actions up to the period ending September 7, 1973, the date the BLM notified the FPC that the Bureau of Reclamation had no plans for the subject site which would warrant further suspension of the contest proceedings, and that negotiations would get underway again. The Staff Counsel ended his review by stating that: "To date, the Commission has not been informed as to the outcome of those negotiations." 15/ He then concluded that based on the history of the project, "particularly with respect to the fact that the Oroville Project No. 2062 no longer generates any power," appellant's license order would be rescinded.

Based on the facts recited above, we find no relationship between appellant's present status before the FPC and the actions taken by BLM regarding appellant's patent. The FPC hearing dismissal and license rescission were the legal result of appellant's failure to operate its power facilities. We find that any rights under the Federal Power Act lost by appellant were in no way caused by the alleged reliance on the invalid patent provision.

14/ Nor is our conclusion altered by the fact that the State Office issued its decision of March 11, 1974, authorizing the grant of a supplemental patent to appellant in lieu of forfeiture. The Department has a continuing jurisdiction with respect to public lands until it divests itself of all interests in the land, and the Director, Bureau of Land Management is not estopped from reversing or correcting decisions of his subordinate officers where, as here, the matter remains within the jurisdiction of the Bureau. Barney R. Colson, 70 I.D. 409, 413 (1963), aff'd, Colson v. Udall, 428 F.2d 1046 (5th Cir. 1970), cert. denied, 401 U.S. 911 (1971).

15/ By letter dated April 16, 1974, a date following the motion to rescind appellant's license, the BLM notified the FPC of the withdrawal of the contest complaint and the proposed payment in lieu of forfeiture settlement.

In addition to denying appellant's estoppel argument on the grounds that no serious injustice will occur, we note also that the doctrine is not available to appellant in this case because its application would greatly harm the public interest. See the estoppel cases, supra. The estoppel asserted here would divest the Government of all jurisdiction over the land and thus preclude enforcement of the Recreation and Public Purposes Act requirement that lands patented under the Act be devoted to a definitely proposed project for the benefit of the public.

Accordingly, we conclude that it was proper for the BLM to declare the payment in lieu of forfeiture clause void and to vacate the prior decision dismissing the contest proceeding and authorizing issuance of a supplemental patent under the Recreation and Public Purposes Act.

We do not believe that a hearing before the Board is justified and, thus, appellant's request for a hearing is denied. 43 CFR 4.415.

Therefore, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the decision appealed from is affirmed.

Martin Ritvo
Administrative Judge

We concur:

Edward W. Stuebing
Administrative Judge

Joseph W. Goss
Administrative Judge